TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 149

JESSIE L. WICKWIRE, INDIVIDUALLY AND AS EXECUTRIX AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF EDWARD L. WICKWIRE, DECEASED, PETITIONER,

vs.

MABEL G. REINECKE, AS COLLECTOR AND AS ACTING COLLECTOR OF INTERNAL REVENUE, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[redacted]

[redacted]

(22,321)

(32,331)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 764.

JESSIE L. WICKWIRE, INDIVIDUALLY AND AS EXECUTRIX AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF EDWARD L. WICKWIRE, DECEASED, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 10, 1927

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Walter C. Lindley, District Judge of the United States for the Northern District of Illinois, on Thursday, the eighteenth day of June, in the year of our Lord one thousand nine hundred and twenty-five, being one of the days of the regular June Term of said Court, begun Monday, the eighth day of June, and of our Independence the 150th year. Placita.

Present:

Honorable Walter C. Lindley, District Judge.

Palmer E. Anderson, U. S. Marshal.

Charles M. Bates, Clerk.

Aug 8. 2 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Jessie L. Wickwire, Individually and as Executrix and Trustee under the Last Will and Testament of Edward L. Wickwire, deceased,
vs.
Mabel G. Reinecke, as Collector and as Acting Collector of Internal Revenue, First District of Illinois.
} At Law No. 34608

Be It Remembered that on this day, to-wit: the 8th day of August, A. D. 1923, there was issued out of the Clerk's office of said court a certain Summons, together with Marshal's return thereon endorsed is in words and figures following to-wit:

3 District Court of the United States of America
Northern District of Illinois } ss:

United States of America To the Marshal of the Northern District of Illinois—Greeting:

We Command You To Summon Mabel T. Reinecke, Collector of Internal Revenue, First District of Illinois, if found in your District, to be and appear before our Judge of the District Court of the United States for the Northern District of Illinois, on the first day of the next Term, thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of September next, to answer unto Jessie L. Wickwire, Individually and as Executrix of and Trustee under the Last Will and Testament of Edward L. Wickwire, deceased, of a plea of trespass on the case upon promises, to her damages, as she alleges, of Twenty Thousand Dollars ($20,000.00), and have you then and there this writ.

Witness, The Hon. George A. Carpenter, Judge of the District Court of the United States of America, at Chicago aforesaid, this 8th day of August, in the year of our Lord

one thousand nine hundred and 23 and of our Independence the 148th year.

JOHN H. R. JAMAR,
(Seal) *Clerk.*

* * * * * *

(Endorsed): Summons Returnable Sept. Term, A. D. 1923 John H. R. Jamar, Clerk. Filed _____, A. D. 192____, Clerk. Wyman, Hopkins, McKeever & Colbert, Attorney.

I executed this writ within my district in the following manner to-wit:

Upon the within named Mabel T. Reinecke Coll. of Internal Revenue by delivering a true copy hereof to Miss L. E. Jones, Secretary, on the 20th day of August A. D. 1923 at Chgo., Ill.

ROBERT R. LEVY,
U. S. Marshal
by FRANK J. OTTO,
Deputy

Marshal fees
1 services 200
No mileage

(Endorsed) Filed Aug. 30, 1923 John H. R. Jamar, Clerk

4 And on to-wit: the 8th day of August, A. D. 1923, there was filed in the Clerk's office of said court a certain Declaration, in words and figures following to-wit:

5 • • • • • •

Par. 1. Comes now Jessie L. Wickwire, individually and as Executrix of and Trustee under the Last Will and Testament of Edward L. Wickwire, deceased, plaintiff herein, and for cause of action against the above named defendant, alleges:

1. Plaintiff is and for more than ten years last past has been a resident of the City of Chicago, County of Cook and State of Illinois.

2. On to-wit: the 22nd day of December, 1919 said Edward L. Wickwire gave, transferred and delivered actual physical possession of divers moneys and securities of the value of to-wit: $362,028.48, to Jessie L. Wickwire, his wife, plaintiff herein, in pursuance of a desire by said Edward L. Wickwire that he and his said wife should share equally all property formerly owned by him, and in pursuance of an agreement theretofore existing between them to that effect.

3. The said transfer was not made by the said Edward L. Wickwire in contemplation of death, or with intent that same should take effect in possession or enjoyment at or after the date of his death.

4 The said Edward L. Wickwire died on to-wit: the 21st day of April, 1920, of a disease diagnosed as uremic poi-
6 soning, and leaving a Last Will and Testament in and by which he nominated the plaintiff herein executrix of and Trustee under said Last Will and Testament.

5. The said Last Will and Testament was thereafter duly admitted to probate in and by the Probate Court of Cook County, Illinois, and the plaintiff herein duly qualified and entered upon her duties as Executrix of the Last Will and Testament of said deceased.

6. Thereafter, and in accordance with the law in such case made and provided, plaintiff filed in the office of the Collector of Internal Revenue for the First District of Illinois, a certain report for the purpose of ascertaining the federal estate tax to be levied against the estate of said deceased, showing a total gross estate of $314,249.42, and a net estate, subject to Federal Estate Tax, of $242,280.11 (which sum included no portion of said amount of $362,028.48 and thereafter the plaintiff paid to John C. Cannon, Collector of Internal Revenue, First District of Illinois, as and for a Federal Estate tax under the Revenue Act of 1918 against the estate of said deceased, the sum of to-wit; $5,266.00

7. Thereafter plaintiff duly filed her final account and report in the Probate Court of Cook County, Illinois, and was duly discharged as such Executrix, and entered upon her duties and is now acting as Trustee under the Last Will and Testament of said deceased.

8. Thereafter the Collector of Internal Revenue at Chicago, Illinois, notified plaintiff that a certain transfer of cash and securities valued at the sum of to-wit: $362,028.48, made by said Edward L. Wickwire in his lifetime to Jessie L. Wickwire, plaintiff, was deemed by said Collector to have been made in contemplation of death, and as such to be taxable under and by virtue of Section 402 of the Revenue Act of 1918; that thereafter a hearing was had on said claim by said Internal Revenue Department for an additional tax from the estate of said deceased upon the amount of said
7 transfer before one E. E. Alden, Internal Revenue Agent in charge, in the Federal Building, Chicago, Illinois; and thereafter said E. E. Alden duly transmitted to the Commissioner of Internal Revenue, at Washington, D. C. his report of the evidence adduced at said hearing, and his conclusions thereon; and thereon plaintiff was notified, by one McKenzie Moss, Deputy Commissioner in the office of the Commissioner of Internal Revenue, Washington, D. C., that after careful consideration of all evidence submitted by the Government and by plaintiff, and of plaintiff's briefs, the Bureau had reached the conclusion that on the evidence then in the files, the said transfer from said Edward L. Wickwire to his wife in December, 1919, of cash and securities as above set forth was made in contemplation of death, and the value of the property so transferred was consequently subject to Federal Estate Tax.

9. Thereafter, upon request of counsel for plaintiff for an opportunity to be heard, and to present arguments upon the question of the taxability of said transfer, plaintiff was notified that a conference would be accorded her on to-wit: December 4th, 1922, in Washington, D. C., which said conference was attended by counsel for plaintiff, and certain evidence presented and arguments made by him for the purpose of establishing the fact that the said transfer was not taxable. Afterwards plaintiff received a letter from John C. Cannon, Collector of Internal Revenue for the First District of Illinois, enclosing communication from the Commissioner of Internal Revenue at Washington, D. C. advising that there was an additional tax liability against the estate of said Ed-

ward L. Wickwire, deceased, amounting to $18,411.23, which amount, unless paid within thirty days from receipt of said communication, would bear interest at the rate of 10% per annum. On to-wit: the 28th day of March, 1923, the
8 Treasury Department notified counsel for that in compliance with his request, another hearing would be granted on Monday, April 16th, 1923, for the purpose of argument of the question of the taxability of said transfer, provided that the executrix of the said estate would file a claim for abatement within thirty days from the receipt by the estate of Bureau letter of notification dated March 3rd, 1923.

10. Said claim for abatement of said tax was duly filed with the Collector of Internal Revenue at Chicago, Illinois, and said hearing on said 16th day of April, 1923, was had in Washington, D. C. before the Board of Review and Appeals, thereafter, plaintiff was notified by letter signed by one Fred E. Page, Acting Deputy Commissioner at Washington, D. C., that the committee on Review and Appeals was of the unanimous opinion that the transfer, above referred to, should be taxed.

11. On April 21st, 1923, the defendant, Mabel T. Reinecke was duly appointed and acting as acting Collector of Internal Revenue, and now is in fact the duly appointed and acting Collector of Internal Revenue.

12. Of said sum of $18,411.23, above set forth, the sum of $18,021.41 constituted the amount of Federal estate tax at the rate prescribed by law upon the said total sum of $362,028.41, over and above the amount of tax theretofore paid by plaintiff.

13. Notwithstanding the fact that the said transfer of cash and securities to plaintiff was not made in contemplation of death, and was not intended by the said Edward L. Wickwire to take effect in possession or enjoyment at or after the death of said Edward L. Wickwire, and although the said transfer of cash and securities above set forth was not by law subject to Federal estate tax, as a part of the estate of said Edward L. Wickwire, or otherwise, yet the defendant,
Mabel T. Reinecke, as Acting Collector of Internal Rev-
9 enue for the First District of Illinois, wrongfully and illegally exacted and collected from the plaintiff, under color of the provisions of Section 402 of the Revenue Act of 1918, and demanded and required plaintiff to pay to her, involuntarily and under duress and compulsion, on the 21st

day of April, 1923, said sum of $18,411.23, (including said sum of $18,021.41) as the balance of the Estate tax due from the estate of said Edward L. Wickwire, deceased. At said time and place plaintiff served written notice upon said defendant, Mabel T. Reinecke, that said payment was made under protest and solely for the purpose of avoiding the imposition of the penalties provided by Section 407 of said Revenue Act of 1918, and otherwise, reserving all her rights to recover said amount so illegally and erroneously assessed and collected.

Thereafter plaintiff duly filed with the Commisioner of Internal Revenue, at Washington, D. C., her claim for refund of the additional tax paid by her as above set forth, to the extent of said sum of $18,021.41, and on to-wit: July 30th, 1923, plaintiff was duly notified by letter from the said Commissioner of Internal Revenue that the claims for abatement and refund of said additional tax therefore filed by plaintiff herein, were each rejected and denied.

Wherefore, plaintiff demands judgment against the defendant for the sum of $18,021.41, together with interest at the rate prescribed by statute from April 21, 1923, and for her costs and disbursements herein.

WYMAN, HOPKINS, MCKEEVER & COLBERT
Attorneys for Plaintiff.

10 W. M. HOPKINS
AUSTIN L. WYMAN
Of Counsel

State of Illinois } ss
County of Cook }

AUSTIN L. WYMAN being first duly sworn, on oath says he is one of the attorneys for the plaintiff in the above entitled cause, and her agent in this behalf.

Affiant further states that he has knowledge of the facts in the foregoing complaint contained, and that the matters and things therein set forth are true as therein stated.

(Seal) AUSTIN L. WYMAN

Subscribed and sworn to before me this 8th day of August, A. D. 1923.

JOHN H. VAN WORMER
Deputy Clerk.

(Endorsed) Filed Aug. 8, 1923. John H. R. Jamar, Clerk.

11 And on to-wit: the 1st day of September, A. D. 1923, there was filed in the Clerk's office of said court a certain Plea, in words and figures following to-wit:

12 • • • • • •

PLEAS

And the said defendant, Mabel T. Reinecke, Collector of Internal Revenue, First District of Illinois, by Edwin A. Olson, comes and defends the wrong and injury, when etc., and says that she did not undertake or promise in manner and form as the said plaintiff has above thereof complained against her. And of this she puts herself upon the country, etc.

EDWIN A. OLSON
United States Attorney for the Northern District of Illinois.

And for a further plea in this behalf, the said defendant comes and defends the wrong and injury, when, etc., and says that she does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said plaintiff has above thereof complained against her. And of this she puts herself upon the country, etc.

EDWIN A. OLSON
United States Attorney for the Northern District of Illinois.

And for a further plea in this behalf, the said defendant comes and defends the wrong and injury, when, etc., and says that she is not guilty of the said supposed grievances above laid to her charge or any or either of them, or any
13 part thereof, in manner and form as the said plaintiff has above thereof complained against her. And of this she puts herself upon the country, etc.

EDWIN A. OLSON
United States Attorney for the Northern District of Illinois.

(Endorsed) Filed Sep. 1, 1923 John J. R. Jamar, Clerk.

14 And on to-wit: the 19th day of September, A. D. 1923, there was filed in the Clerk's office of said court a certain Replication To Pleas, in words and figures following to-wit: Filed 19[illegible]

15 • • • • • •

REPLICATION TO PLEAS

And the said plaintiff, as to the pleas of the defendant firstly, secondly and thirdly above pleaded, whereof she has put herself upon the country, doth the like.

WYMAN, HOPKINS, MCKEEVER & COLBERT
Attorneys for Plaintiff

(Endorsed) Filed Sept. 19, 1923 John H. R. Jamar, Clerk

16 And afterwards, to wit, on the 18th day of June, A. D. 1925, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge, appears the following entry, to wit: Enter 18,

17 • • • • • •

Present: Hon. Walter C. Lindley, Judge of Said Court:

This cause being called for trial come the parties to this suit by their attorneys respectively, and issues being joined herein, It Is Ordered that a jury come;

Whereupon, come the jurors of a jury of good and lawful men, to-wit: John R. King E. F. Schmidt Gustave Irmiter Charles E. Priebe A. W. Lewis Robert Henry F. E. Reeve Chester T. McGill Edward J. Burr Albert T Peterson Ferd Schmeisser Fred White who being duly elected, tried and sworn, well and truly to try the issues herein, and a true verdict rendered according to the evidence;

Whereupon, the defendant enters herein a motion to dismiss petition, which motion is sustained;

Therefore, it is considered by the Court that the plaintiff take nothing by aforesaid action; that defendant go hence without day; that defendant do have and recover of and from the plaintiff her costs and charges in this behalf expended,

and have execution therefor, to which ruling of the Court the plaintiff here and now duly excepts;

And sixty (60) days time from this date is allowed the plaintiff in which to file her Bill of Exceptions herein, and lease is given the plaintiff to file a Writ of Error and Supersedeas Bond in the penal sum of Five Hundred Dollars ($500.00).

Excep filed 7.

40 And on to wit: the 17th day of December, A. D. 1925, there was filed in the Clerk's office of said court a certain Bill of Exceptions, in words and figures following to wit:

42 United States of America

Northern District of Illinois

In the District Court of the United States,

For the Northern District of Illinois,

Eastern Division.

Jessie L. Wickwire, Individually and as Executrix and Trustee Under the Last Will and Testament of Edward L. Wickwire, deceased. vs. Mabel G. Reinecke, as Collector and as Acting Collector of Internal Revenue, First District of Illinois.	At Law No. 34608

BILL OF EXCEPTIONS

Be It Remembered that on, towit: the 18th day of June, A. D., 1925, being one of the terms of said court, this cause coming on to be heard before the Honorable Walter C. Lindley, one of the Judges of said Court, and a jury duly empaneled and sworn, the following proceedings were had, towit: Appearances:

Mr. Austin L. Wyman, of the firm of Wyman, Hopkins, McKeever & Colbert, for the plaintiff.

Mr. Leo Klein, Assistant U. S. District Attorney, Mr. James A. O'Collaghan, Special Attorney, Bureau of Revenue, Attorneys for the Defendant.

43 The Court: Gentlemen of the jury, this is an action brought by Jessie L. Wickwire as executrix and trustee under the will of Edward L. Wickwire, deceased, against Mabel B. Reinecke, collector, Internal Revenue Department of the United States, First District of Illinois.

It is a suit brought to recover an additional tax assessed against the estate of Edward L. Wickwire, and paid by the plaintiff as executrix and trustee under the will of the deceased upon the estate, an additional tax upon the estate assessed by the Revenue Department under the Revenue Act of 1919, which provides that there shall be collected what is known commonly as inheritance taxes, but spoken of in the Act as estate taxes.

The plaintiff represents that upon the death of deceased, who was her husband, he left a last will and testament which was duly admitted to probate, in which she was made executrix and trustee of the will and that in accordance with the law she made up and filed with the Revenue Department a tax return showing the amount of tax that she claimed was due and that she thereafter paid that tax.

She alleges that thereafter the revenue officials insisted that there should have been included in such tax return a transfer of property made some months prior to the death of deceased by the deceased to her in the sum of $362,000.

The Government claims then that that transfer was a transfer made in contemplation of death and therefore was subject to the provisions of the act which provides that not only property transferred by the will but property transferred before in contemplation of death shall be included in the tax and the Government claims that this was a transfer in contemplation of death.

44 The plaintiff considers that this transfer was not made in contemplation of death, but made under normal circumstances as her proportion of the property that had been accumulated during her husband's lifetime.

She alleges that when the additional assessment was made she protested against the payment thereof, made the protest that the statute requires, that her claim for abatement was denied and that she then paid the tax under protest as the statute requires and filed a claim for refund and that that was denied and that after that, at any rate, she filed this suit to recover the money that she had paid for the additional assessment. The additional assessment was something like $19,000.

I assume that most of these facts will be undisputed. I assume that the substance or that substantially the only question in controversy is whether or not this transfer that was made before Mr. Wickwire died was a transfer made in contemplation of death. If it was, it was taxable under the statute, if it was not in contemplation of death, it was not taxable.

I think he died in April, 1920, and the transfer was made in December, 1919, that seems to appear from the face of the pleadings. The question that will be in controversy here. If it was wrongfully assessed, it should be recovered. If it was not wrongfully assessed it should be retained by the Government.

Thereupon the jury was examined by the Court and accepted by counsel and duly sworn.

45 Opening Statements

Mr. Wyman: May it please the Court and gentlemen of the jury.

This is a case, as the court already told you, involving a claim for refund of federal inheritance taxes or federal estate taxes levied against the estate of Edward L. Wickwire, deceased. He died in 1920, in the Spring. The tax which is sought to be recovered here aggregates in principal a little over eighteen thousand dollars and a claim for additional interest, pursuant to the federal laws.

The particular tax which we seek to recover is an additional tax that was levied and assessed by the government on the transfer of some $362,000.00 worth of securities which were given by Mr. Wickwire to his wife about four months before he died.

We expect to show that Mr. Wickwire was 62 years old at the time of his death. He had been suffering for years from diabetes. He had been afflicted with diabetes or was a diabetic for approximately eighteen years prior to his death.

This suit comes up in this way: Under the law, as the court will tell you, I think, all transfers made by persons within two years of the date of their deaths of a material portion of their estate are presumed to be in contemplation of death, and transfers made in contemplation of death are taxable the same as though they were left by will. Therefore,
46 any transfer made within two years of the date of the man's death is presumed to be taxable, and the burden

then is on the tax-payer to show that it wasn't so made, that it wasn't made looking forward to or anticipating or contemplating death in the immediate or reasonable near future. That is the situation in this case.

Mr. Wickwire had been afflicted with diabetes for approximately eighteen years. We expect to show that this condition up to the month of December, 1919, and for a month or two after that time, was as good as or better than it had been for several years, for ten years approximately before that time; that it was very much better than ti had been in 1910 or 1912, when he first went to see a doctor, who will testify in this case; that the decedent died of a disease diagnosed as uremic poisoning which, we expect to show, was the result of an attack of influenza suffered while he was in the South.

We expect to show that as far back as the year 1912, when he made his will, he had discussed with his wife the fact that she was named executrix in the will, that she was not a business woman, that she had had no business experience, that at that time he discussed, as he did for sometime afterwards, with her the idea that everything they had was 50-50, that half of what he had belonged to her, and we expect to bear that out by incidents which it is not necessary to go into at this moment.

47 We expect to show that Mr. Wickwire's estate at the time of the transfer to her was of the approximate value of $650,000.00 or $700,000.00; that up to the year 1916 or '17 his estate had been tied up for the most part in an interest in the Hirsch-Wickwire business, which was not easily divisible; that about that time the business was reorganized and turned over to other persons, turned over to the employes, by reason of which the stockholders received substantial dividends in the form of bonds that had been purchased for investment in the company.

We expect to show that the reason or one of the reasons for the actual division of this property being made in 1919, or thereabouts, instead of a good many years before, was the fact that it was only in a few or two or three years that this property was available for that purpose, the property being tied up in stock in this company and in this building in which the only interest which he had was that of a stockholder, which wasn't easily divisible and wasn't easily saleable because there was no ready market for it.

We expect to show that he was treated during this period, from 1912 to 1919, very largely by a Dr. Hodgson, who will

testify here, a doctor from Waukesha, Wisconsin, who specializes in brights disease and diabetes, two common kidney diseases.

We expect to show that he met Dr. Hodgson professionally two or three times a year, and that Dr. Hodgson met him
48 there socially when he went to his plant to buy a suit or otherwise; that on various occasions he was told that a diabetic and he himself, in particular, who would take care of himself and follow his diet would live out his natural life or longer; by reason of taking care of himself and his diet, he would have a better chance under some circumstances than the men who didn't have diabetes but who were not so careful of their diet.

We expect to show that whenever there was any discussion by him with any one else, between himself and friends or between himself and the doctors, it was always a radiation of good health, that he felt that he was well, he considered himself well and that he had no thought of immediate death, other than we all have thoughts of death, knowing that death is certain and must come to us all sooner or later; that at the time of making this transfer, the thought of death did not enter into his mind in any way; that this transfer was in furtherance of this desire that he had expressed to his wife and his friends over a period of years, that one-half, figured on the income from this business, one-half of what he had belonged to her.

We expect to show this further point, gentlemen, that will lead up to the possible crucial point in this case, so far as deciding the matter in your minds is concerned, and that
49 is that he had tried in the year 1918 to file separate income tax returns for himself and his wife; that the man who was helping him do that had told him that that could not be done in that way, that there had to be an actual physical division of the property before a return could be filed by himself and a separate return by his wife. The same question came up in the succeeding year. He was in the habit of making out his income tax return insofar as he could and he figured the income before the first of the year before he went south. He went South after the 1st of January or the latter part of December, and he would get his figures assembled each year before he went. That question came up again in the year 1919.

We expect to show that on October 10, 1919, he executed a memorandum in which he stated that half of everything

that he had, of all his stocks, bonds and securities, belonged to his wife, Jessie L. Wickwire. We expect to show that that was left in his box, put in his safety deposit box; that when the question of making up his income tax return for that year came up, he was told that there had still been no actual physical division; that it was too late then to make up separate returns for that year and that, if he wanted to make such a division, if he wanted to give actually and outright one-half of his estate to his wife, he would have to do it promptly in order to take advantage of it the next year.

50 We expect to show that this transfer then was made in December, 1919. He died in April.

The only other point which will be of interest here, either to the government or to ourselves, will be the fact that in 1919, in the Fall, along in the month of September, I believe the evidence will show, while playing golf he suffered a partial paralysis of the eye, which caused him to see double. Playing cards he saw two spots where there was only one, playing golf he saw two balls. We expect to show that he was treated for that. He went up to see Dr. Hodgson, who assured him that here was no connection between that and his diabetes. He went to an oculist who gave him first dark glasses while he was preparing special lens that cured the astigmatism, and that, by the latter part of December when the actual transfer was made, he was apparently in normal health, except for the fact that he was a diabetic, not actually afflicted with diabetes, the doctors say, but a diabetic liable to have diabetes recur in him. That at the time, in December, in spite of this little bit of trouble that he had, in spite of the fact that he had been a diabetic for eighteen years, he was following his diet very rigidly and carefully, and he was in excellent spirits and excellent health except for the diabetic condition.

The transfer which he made then had absolutely no connection and no bearing on the fact that he died, or the fact that he died had no bearing on the transfer or that the

51 transfer was not made in contemplation of or looking forward to his death, some four or five months later, and that that happened as it might happen to you or I under normal circumstances.

The transfer was made voluntarily for the purpose of giving his wife outright a half of his estate and that the transfer was, therefore, tax free.

In order to avoid penalties, in order to avoid other pen

alties provided by law, a great many penalties, the tax was paid, and suit brought against the government immediately to recover after a claim for abatement had been filed and after a claim for refund was filed, when that was denied.

The Court has said he assumes the material points other than the questions of fact would be admitted. That is true.

Neither the government nor ourselves are desirous of spending a lot of time on purely technical points, and the result is we have a stipulation which I will ask to file here which has a bearing on the technical points involved here, which it is not necessary to read; the fact that he died at this time, in 1920, in the Spring, that the transfer was made in 1919, in December, that it consisted of $362,028.14, which is the agreed value of the securities, that he died the following Spring, that he had been suffering from diabetes or had been afflicted with diabetes for a long time prior to that time,

52 that the original tax which was estimated by the estate to be due was paid, that, thereafter, the estate was notified that the additional tax was due here on account of the transfer. The estate disagreed and went before the bureaus of the government on it, and the bureaus of the government said that the transfer was in contemplation of death; that claim for abatement was filed, as prescribed by law, that the claim was denied, and the tax was then paid. A claim for refund was then filed and that claim denied. All these things being steps that the law says we must take before we come to court. Immediately after the claim for refund was denied, this suit was brought, and it comes up before you gentlemen for a determination solely on the question of whether or not in the mind of the giver of this property the thought of death was uppermost or was controlling in the matter of the gift, the thought of death in the near or immediately near or reasonably future.

Mr. O'Callaghan: I represent the defendant, Mrs. Reinecke, who is the local Collector of Internal Revenue for this district. Now, in a case of this character the Collector, in making assessments or causing assessments to be made, has to depend upon her investigations, and facts which she develops and, in fact, gets through the other side largely. Because she is not in at the time this transfer was made. Of course, she wasn't advised. All these things come up

53 after the death, after the returns are filed by the estate. So then the government investigates, or the Collector investigates.

Just to correct one thought on the law, which I hope you didn't take literally, as announced by counsel. He doesn't mean it. I hope you didn't get the thought that every transfer which a man makes of his property before his death within two years is assessed a tax by the government. That, of course, is not the law. For example, the government is not concerned if you want to sell your building or your home or real estate or your bonds one year before your death.

What brings it within the statute is this: If you make a sale of a bona fide asset or property before your death at any time, irrespective of two years, there is no estate tax levied on that, so long as it is shown that it was made in a bona fide way and for a valuable consideration. But if there is an integral part of a man's estate transferred within two years and before he died, without any consideration whatever shown for it, then the law says that it is made in contemplation of death and is assessable, unless the contrary is shown. Don't get the thought that taxes are assessed on a man's transfer of property within two years. That is not so. It is only when it is not made bona fide when the government comes to the conclusion that it is not a bona fide transfer,
54 in other words, that it is made for the purpose of dodging the tax which estates ultimately have to pay.

So that in this case when the investigation was made by the Collector, which she was obliged to make under her oath of office and under her bond, she is obliged to make these investigations and make these assessments, it appears that the deceased, Mr. Wickwire, had been suffering for a great number of years from diabetes, that he was gradually losing flesh, and when he got down to about the beginning of October he was very emaciated and sick, and that about the beginning of October or the end of September, just the exact date I don't know now, he had a hemorrhage of the eye and that as a result of that his family became aroused and anxious about him, and his brother in-law, Dr. Stevens, caused him to be brought to Dr. Patrick, a specialist of this city, also another doctor, several doctors, were consulted and decided it was only a question of diet. That was about the second of October. And in fact, on the 10th of October, I believe the evidence will show, the first day he consulted Dr. Patrick, that he made this attempted transfer, wrote some sort of a paper and in which he said that so much of the estate belonged to his wife and so much to him. That was on the 10th of October.

Now, then, he had in mind going to Florida to recu-
55 perate, and his wife was going with him, and that shortly before they left, *or about the 22d of December, after* discussion, they realizing that possibly this paper wasn't just sufficient or probably it wouldn't stand up legally to show a transfer, so to be sure of it, they proceeded to go over to the vault where these bonds and securities were—by the way, the transfer was all of bonds and securities, liquid assets, as they call them—and then, in order to complete it physicaly over there, on the 22d of December, 1919, before they left for Florida, a physical transfer of the matter in the vault was made, and that then they went to Florida, and he came back again and in April, 1920, he died.

From these facts and from the circumstances surrounding the situation, as they will be presented to you, the Collector of Internal Revenue believed that under the law she was obliged to make an assessment or caused the assessment to be made, that the transfer was made in contemplation of death, that about the beginning of October and right along he had in mind, owing to his physical condition, that the end was not far away.

That doesn't mean in a day or two, one month, six months or a year or anything of the kind, but what was operating in his mind, what was his mental condition at the time he made this transfer and that he had in contemplation death, wanting to avoid the tax to be assessed upon it.

Now, of course, under the law, after the assessment
56 is made, the representatives or the beneficiaries of the estate have a right to appeal further. There were several appeals to the various boards organized to handle these things in Washington, and, after the evidence was presented by counsel, they sustained the position of the Collector.

That is generally our view of the situation.

The Petitioner, to maintain the issues in her behalf, introduced the following witnesses, towit:

W. M. HOPKINS, a witness on behalf of the Petitioner, after having been first duly sworn, testified as follows:

Direct Examination by Mr. Wyman.

Q. Will you state your name, please?
A. W. M. Hopkins.
Q. Where do you live, Mr. Hopkins?

A. Chicago.
Q. What is your address?
A. Business or residence?
Q. Residence.
A. 1234 Farwell Ave.
Q. What is your occupation?
A. Attorney at law.
Q. Did you know Edward L. Wickwire in his lifetime?
A. Yes.
Q. What was his occupation?
A. He was a merchant.
Q. Connected with what business?
A. In the clothing manufacturing business, with the firm of Hirsch-Wickwire Co.
Q. How long did you know him?
A. Since 1913.
Q. Until when?
A. His death.
Q. Which was when? 1920?
A. April 20th, 1920.
Q. Did you ever render any services to Mr. Wickwire as an attorney at law?
A. No sir.
Q. Were your dealings with him social or business then? In a business way or social way?
A. Social.
Q. How often, on an average, did you see him during the eight year period from 1912 to 1920, if you can state?
A. Very frequently.
Q. On an average of how often a week or month?
A. Well, for several years we played golf together in the Summer; once or twice a week.
Q. Did you see him during the Winter except when he was down South?
A. Yes. I saw him nearly every day.
Q. Under what circumstances?
A. He and I were both members of the same club, the Union League Club, and I met him at the club where we both usually lunched.
Q. Did you play cards with him?
A. How?
Q. Did you play cards with him?
A. Yes. Played bridge with with him frequently, a great many times.

Q. Did he ever discuss with you in the early years of your acquaintance the condition of his health?

A. Yes.

Can you remember any specific conversations and the place of any specific conversations, in the early years of your acquaintance, with reference to his health?

A. Yes.

58 Q. Name one.

A. In 1913 Mr. Wickwire took out some life insurance in an old line company, and he mentioned that fact to me, and felt very much pleased over the matter because, as he said, he was a diabetic, and notwithstanding that fact he had successfully passed that examination.

Mr. O'Callaghan: I move that be stricken out as a conclusion of the witness and hearsay.

The Court: How fully did you go into these facts before the Commissioner?

Mr. Wyman: I wasn't present. I wasn't a member of the firm at that time. The firm was organized in the last four years. Mr. Hopkins was present at that time before the Commissioner. I can't say as to that.

The Court: As I understand the situation, there was an appeal to the Commissioner.

Mr. Wyman: Yes.

The Court: Then you had a hearing?

Mr. Wyman: Yes.

The Court: And this proposition was submitted on the question of whether or not this transfer was in contemplation of death?

Mr. Wyman: Yes.

The Court: And the Commissioner found that it was?

Mr. Wyman: The claim for abatement and refund was heard as one, due to the fact that we had no time to send up our record.

59 The Court: At that time was there evidence submitted upon this question.

Mr. Wyman: No. It was submitted on the transmision of the report here.

The Court: Did you raise the question on the examination of the facts that were before the Commissioner?

Mr. Wyman: Beyond any question.

The Court: On what basis do you raise the question here?

Mr. Wyman: I haven't the authorities, but I think the question was raised, that the suit must be brought within

six months on the claim. Upon the question of fact, if the claimant is to be precluded without the benefit of a jury trial by the action of the Department, that is solely the representative of the government—this was before the Board of Tax Appeals was created—if the claimant is precluded without the benefit of a trial by jury by departments solely the agents of the government and interested solely in the welfare of the government, there would be no reason for the provision of the statute permitting or authorizing suit at all.

The Court: There might be various questions raised. There might be the question raised as to the correctness of his interpretation of the statute under which it was attempted to enforce or assess the tax. It might be contended that he had so construed the act as to make it unconstitutional. But here the question, as I understand it, and the sole question in controversy is, whether or not this transfer was made
68 in contemplation of death, which is purely a question of fact.

Mr. Wyman: Yes.

The Court: Now that question was decided, first of all, by some official, and finally sent to the Commissioner and he passed upon the matter, being an administrative officer.

Mr. O'Callaghan: And also passed upon by the Board of Tax Appeals.

Mr. Wyman: No it was not.

Mr. O'Callaghan: Or the reviewing court.

The Court: That's under the old statute. The Committee on Review and Appeal. Now, why doesn't this come within the line of findings of administrative bodies?

Mr. Wyman: So that it would be reviewable only by certiorari, for example.

The Court: So that you can examine only into the illegality, a wrongful interpretation of the statute or an unconstitutional interpretation of the statute, or the fraudulent acts of the Commissioner, and not into a review of his executive acts on questions of fact.

Mr. Wyman: I haven't heard the point raised, and I have seen no authorities, and I am frank to say I have looked for none on that point. But the only federal cases that have interpreted the question "in contemplation of death" have gone into the pure questions of fact as to the correctness of the instructions by the court to the jury, where the same procedure had been followed. There is no right to relief in the

federal courts until each and every step prescribed by
61 the statute has been followed and carried through to completion. In 280 Fed. is a case *Vaughan* v. *Riordan*, that went to the Circuit Court of Appeals, where it was abandoned, where every question of fact from start to finish was gone into, and the court discussed very fully the questions of fact. The point wasn't raised that you refer to here, as to whether it was proper to raise those points.

The Court: Well, it is not a novel question because this same question comes up in the assessment of all taxes. The assessment of taxes for revenue purposes is a summary proceeding that every government indulges in. Now, you have the same proceeding that your tax assessor has in your local counties. The tax assessor makes an assessment. You can't dispute that assessment. The Board inquires into the validity of his assessment. You can't determine whether or not he assessed it too high or too low. If you don't own the property, you may maintain a suit in equity to enjoin.

Mr. Wyman: Or, if the tax is too high or too low, fraud might be presumed.

The Court: That's what I am getting at. There must be some fraudulent action, there must be some fraudulent act on the part of the administrative officer before the petitioner would have a right to inquire into its validity. Now,
62 when the assessor makes you tax, you have a right under the statute, as I remember it, to submit the matter to the Board of Review. Isn't the Board of Review's decision on valuations final?

Mr. Wyman: That's true.

The Court: Now, there is not any statute, as I remember it, which says that the action of the Commissioner in passing upon valuations or upon whether or not a transfer is made in contemplation of death shall be deemed final or not. But the question is whether it comes within the line of decisions of the Supreme Court which hold that the act of an administrative officer, within the line of his duties, within the line of his duties prescribed by statute, in the absence of fraud, in the absence of plain illegality upon his part, shall be final in tax matters, where the matter is brought before the Commissioner.

Mr. Wyman: The government has never raised the point on appeal. If you wish to suspend while I look into it—it's new to me—so that we can dispose of the case entirely upon our claim.

The Court: Have you read this case, the Park Falls Lumber Company case?

Mr. Wyman: No.

The Court: In that case, in the 194 Fed. 160, the court said. (Reading.)

Mr. Wyman: As I say, I haven't looked into that
63 point, and I would want time to press it. The government hasn't raised it. They filed a plea of the general issue.

The Court: I don't care whether they raised the point or not. If I haven't any right to do it, I won't do it.

Mr. Wyman: That's true.

The Court: From your opening statement, it appears that there was a question of fact submitted to the Department, upon the question of whether or not this transfer was made in contemplation of death.

Mr. Wyman: That's true.

The Court: It is apparent from that statement that there was a debatable question raised and submitted and decided, and the burden having been upon you, because under the law the presumption was that it was in contemplation of death. If that is the situation, it becomes very material for me to determine whether or not this jury and this court shall inquire into the facts that have already once been determined by an administrative body, there being no provision in the statute which says that his finding shall be conclusive.

Mr. Wyman: I appreciate that. The point is new. It has not been intimated to me before. I say it is new in this case. All the federal cases in which this point has been discussed—and I have gone through every one in the country—have made no mention of that point. Presumably the
64 point wasn't raised or it would have been decided, where each step was followed that we followed here, and the case then taken to the law courts. We don't want to waste your Honor's time, if you feel that is the situation, but we would appreciate an opportunity of briefing that particular point, if that is your Honor's personal feeling.

The Court: What do you say about that, Mr. O'Callaghan? What is your position in that respect?

Mr. O'Callaghan: My position is exactly in accord with the decision of the court of the Seventh Circuit, from which your Honor has just read.

The Court: Of course, that wasn't a case to recover federal transfer taxes.

Mr. O'Callaghan: No.

The Court: It was a case in which the plaintiff sought to recover an additional capital stock tax assessed, but, as I understand it, the same administrative officer's act and the same statute, the same provision, the same administrative ruling applies. Has this particular question ever been raised?

Mr. O'Callaghan: Not in any of the books that I am familiar with. They have been discussing it. It has been discussed very extensively. Just what the final determination of any court outside of the Seventh Circuit has been on it, I am not familiar.

The Court: This is the Circuit Court of Appeals of the Seventh Circuit and, whether I agree with the soundness of the doctrine or not, is absolutely immaterial so far as
65 the decision of this court stands untouched.

Mr. O'Callaghan: The district court at Denver in the Polden case announced the same line of thought on the subject.

The Court: Was this case taken up to the supreme court?

Mr. O'Callaghan: Not that I know of. The Park Falls Lumber Company case.

The Court: It was decided in 1924. It may be they filed a certiorari and it was denied.

Mr. O'Callaghan: We could find that out. Also Judge Geiger in the district court at Milwaukee announced the same doctrine which you mentioned.

The Court: Was there any review of his decision?

Mr. O'Callaghan: No.

The Court: It is a question to be decided sooner or later.

Mr. O'Callaghan: Yes. It has been agitated and discussed, but never squarely decided.

The Court: The findings of the Interstate Commerce Commission and the findings of State commissions and the findings of the Secretary of Agriculture, when he makes a ruling in regard to packing houses, is of the same character. If they are going to establish a line of doctrine in regard to the findings of the Commissioner of Internal Revenue in tax cases, it is time to know it.

66 Mr. Wyman: In the Court of Claims, the government hasn't raised it in the last two months. I was just talking to the counsel for the government. It is a new question. I would like an opportunity of presenting it.

The Court: My decision contrary to that decision in the lumber case in this case would not stand in that court.

Mr. Wyman: No. If a taxpayer is precluded, in the absence of fraud or error on the record, which might be taken advantage of under some circumstances, there would be no remedy as such in the action outlined in the district court, because—

The Court: An inquiry into a debatable question of fact must be decided by the administrative officer. It seems, if we are to go into this question of fact, we are to ignore the line of reasoning that the supreme court has followed and ignore the decision of this circuit.

Mr. Wyman: Do you have the revenue act?

The Court: There is nothing in the revenue act, so far as I can find, which determines what question the trial court shall go into.

Mr. Wyman: Does the act state that the decision of the Committee on Review and Appeals shall be final for all purposes?

The Court: No. So far as I have read it, it does not.

Mr. O'Callaghan: You are correct.

67 Mr. Wyman: It says suits may be brought in the federal court to recover the tax after certain formalities have been complied with.

Mr. O'Callaghan: There is no doubt about that, if there was any fraud on the part of the officer or anything of that kind.

The Court: That is exactly the same situation that this Circuit Court of Appeals had before them.

Mr. Wyman: That was a capital stock tax. The government brought suit to recover the tax.

The Court: No. This was a suit brought to recover, after the claim for refund was denied.

Mr. O'Callaghan: Even in the Milwaukee case, District Judge Geiger held there that, even on the question of the valuation, the court didn't have a right to inquire into that; that it was fixed after a fair hearing by the Commissioner.

The Court: That question does not depend at all upon my own feelings about what the law should be.

Mr. Wyman: No. I appreciate that. If that were the case, then the only recourse the taxpayer would have would be to sit by and refuse to testify or have any hearing before the Commissioner.

The Court: No. His remedy was to submit all of the evidence and go to a full and complete hearing and take his

chances on winning there, just as he would before this jury.

68 Mr. Wyman: The fact that it was passed without being touched on by justices of other Circuit Courts of Appeals or the fact that the supreme court has passed on tax questions without raising that question does not preclude the defendant from raising it here, but, I feel, under the circumstances that we ought to at least have time to go into the question for the purpose of submitting it to your Honor, because it becomes totally new here. Counsel gave me no warning of it. We came here prepared for trial on the merits and the pleadings.

The Court: I think the court's duty is to raise this point.

Mr. Wyman: Yes. At the same time, if the question did go up and had to come back—

The Court: There is no use spending a lot of time if it is—

Mr. Wyman: I wouldn't want you to pass upon it without giving me an opportunity to look into it.

The Court: Suppose I go until two o'clock.

Mr. Wyman: That will help.

The further hearing of this question was continued until two o'clock of the same day.

69 June 18, A. D., 1925.

Thursday, 2:00 o'clock, P. M.

Court met pursuant to adjournment.

Mr. Wyman: During the noon hour I have looked up some authorities. I have analyzed this lumber case, and have found one or two additional authorities holding to the contrary to the apparent holding of the Lumber Company case. I have one here that I would like to take up before referring to the Park Falls Lumber Company case. The first case is a case which was disposed of in the Court of Claims eight weeks ago. That was an inheritance tax case. I wish to call your Honor's attention to something he already knows, that is, that the Court of Claims, by recent legislative enactment, is practically a court of last resort, subject to certiorari in the United States Supreme Court. In other words, its decisions are final, and it is the Court of Claims for the entire country and not for the separate judicial districts. It just involved a pure question of inheritance tax, no capital stock tax. The court devoted some two or three pages to findings of fact and

two pages to the opinion. It discussed two points raised by the government. The second point was the question raised here, and that contention was disposed of after a very thorough review of the facts in this manner:

70 The Court: What were they reviewing there?

Mr. Wyman: A claim filed for refund in the Court of Claims. The estate is returned as valued at $805,000.00. Over the protest of the executor, the Commissioner of Internal Revenue added to the gross estate the sum of $238,000.00, representing lands conveyed and alleged by the government to have been in anticipation or contemplation of death. That was added on the ground that the conveyance was made in contemplation of death, and assessed an additional tax of $99,956.00 on account thereof, which was paid under protest. Application for refund was made and refused again on rehearing and action brought in the Court of Claims, which was open to us in this suit.

The Court: The same question raised.

Mr. Wyman: The same question raised. As I understand from the dockets as shown in the tax digest, the Park Falls case is up on an application for certiorari without any disposition having yet been made. In the Park Falls case—I didn't have the opinion this morning, although I heard of it in general,—it appears that Judge Geiger disposed of the proceeding, without the hearing of any evidence, on the opening statement of counsel; more or less in the nature of a finding against the plaintiff on his opening statement, which is rather unusual but not particularly improper.

The complaints raised there are classified by the court
71 as two. First, that an error had been made in the manner of disposition, and they approved the manner of disposition of the case by stating not only the opening statement had been considered but specific orders of proof had been made which were improper and which would not have controlled in the decision of the case in favor of the plaintiff if the offers had been allowed. Then they go into the question as to the effect to be given of the assessment of the Commissioner insofar as its finality was concerned, and the cases are then cited which you read to me this morning in referring to the matter, but the case goes into the question of fact, and all the facts in the case are discussed.

The Court expressly says that the evidence tendered must be considered under paragraph 3 and devoted approximately eight pages to discussing whether or not the evidence offered

would have been competent or would have proven any of the issues in the case, matters which would be purely obiter dicta if the Court had no right to consider them. Beyond any question the Circuit Court of Appeals intended that the finding under Sec. 2, the second paragraph, was intended to be a finding that the remedy prescribed for refund limited the taxpayer to his remedy before the Commissioner or before the Department, but on going through that paragraph very carefully I am unable to find that there is an adjudication on
that point although the syllabus appears to bear it out.
72 On the question of what is prima facie correct, the decision holds in one paragraph that where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive, even upon mixed questions of law and fact or of law alone, and his action will carry with it a strong presumption of its correctness, there citing from *Bates* v. *Payne*, 194 U. S. 106. The question is not raised in the first place that it was a sole question of fact because the question of contemplation of death, the question of fact, is uppermost and must always be uppermost, but there is also a question of law, and the court held it was a mixed question of law and fact.

That paragraph approves that position without expressly holding, and I wasn't able to find anything in this paragraph that expressly holds that the decision of the Commissioner on mixed questions is final. The court goes on to discuss pure questions of fact which would be wholly unnecessary had its decision been that the ruling of the Commissioner was final.

The 1924 act establishing the Board of Tax Appeals, apparently desiring to place with greater strictness to the taxpayer a fence against the unlimited prosecution of claims for refund, expressly provides that the findings of the Board
of Tax Appeals shall be deemed prima facie correct. It
73 is well known and the court should take judicial notice that the Board of Tax Appeals is recognized as being a taxpayer's body so far as its decision is concerned, it being a civilian institution rather than a purely governmental body made up of government employes or appointees. That is the wording of the 1924 act, "shall be deemed prima facie correct."

No such wording appears and nothing from which we can infer from the old act, as to the Committee on Review and Appeals. But the inference there, it seems, is very strong

and is certainly strong in the case of the act in creating the Board of Tax Appeals because of the fact that if there were no remedy as to that on questions of fact, their ruling must necessarily be all conclusive.

In the *Bernheim Distilling Co.* v. *Mayes* case, 268 Fed., the court found in this manner. (Reading.) That is in the Circuit Court of Appeals of Kentucky, the Sixth Circuit, decided October 11, 1920.

The decision in the Leggett-Myers case goes on following a long line of decisions to which there has never been any dissent on the question of the interpretation of the taxing statutes or laws.

I appreciate when the Circuit Court of Appeals in the circuit in which your Honor is sitting has ruled, you feel more bound and must of necessity feel more bound by its decisions, if they are directly in point or closely or nearly in point,
74 than by the decision of courts of equal competent jurisdiction and concurrent jurisdiction, insofar as the rulings are concerned, of different circuits. Your Honor must consider the decisions of the courts of this circuit.

If you still feel that this Park Falls Lumber Co. case holds flatly that no remedy or right lies in favor of the taxpayer on the question of fact, once it has been disposed of by the Commissioner, we must go to the case in the Court of Claims, and as between the Court of Claims and the Circuit Court of Appeals I am frank to say I don't know exactly what the status is. The Court of claims—there is one jump between that and the Supreme Court. It is a court for the entire United States; and there is one jump between the Circuit Court of Appeals and the Supreme Court. Both of these decisions were in April of this year. One matter remains undisposed of.

Looking at it from a purely equitable point of view, which the court can do, I feel it is a very grave miscarriage of justice that the claimant should be barred from the right to sue in a court in her own district, when if she could have anticipated the defense, she could have gone direct to the Court of Claims. I don't believe that the Park Falls Lumber Co. case is a decision squarely in point. The one in the Court of Claims is beyond any question. It's an inheritance tax proceeding there. If there is any more credit or faith
75 to be placed in one than the other, I should say it would be in the one most nearly in point. Neither of them, of course, are final.

I feel that the intention of the statute is for a review in the court on the question of fact, as shown by that decision. That's what we are asking here, your Honor.

Mr. O'Callaghan: We feel that the decision of the Circuit Court of Appeals of this circuit is controlling on the question in this circuit; that the taxpayer elected to sue in this district within this circuit, and by invoking the judicial powers of the courts of this circuit.

The decision of the Circuit Court of Appeals of this Circuit seems to be well founded and well backed up by authority from the Supreme Court of the United States down.

Now, the only case that counsel suggests that seems to disagree in any manner with the Circuit Court of Appeals of this circuit is the case in the Court of Claims. The decision I am not familiar with. In fact, I haven't read it. I didn't know that it had been decided. You will notice that the Court of Claims does not go into the question as the Circuit Court of Appeals of this circuit did.

Now, you must remember also, your Honor, that the Court of Claims was open to the litigant in this case. You must also remember that the Court of Claims is a special sort of court established by statute, whose jurisdiction is very
76 strictly limited. They have jurisdiction only of certain classes of cases. Their procedure is limited. The procedure there is not by jury trial, or anything of that kind.

That is a mere statement in that case by the Court of Claims without giving any authority whatsoever, not backing it up. And, in view of the fact that it is not a court of general jurisdiction, I don't think that this court should be even advised that anything there is determinative of the question at issue here.

As I said before, it is a limited kind of a court, set up for claims against the government, etc., to adjudicate those claims. They have no trials by jury. It hasn't general jurisdiction.

And especially in view of the fact that the supreme court has not passed upon the decision of the Court of Claims, and in view of the clear language of our own circuit court, I believe that the court in this instance should follow the Seventh Circuit.

Mr. Wyman: In the Park Falls case, my attention was called to the fact that the actual ruling of the court on the previous citations under the second paragraph was on the question of the finding of the court as to the wilful and in-

tentional omission of a large part of the capital value from the return represented by unearned surplus and un-
77 divided profits, and that the decision of the court in quoting these previous decisions limits its finding to one point, and that the decision, and that the decisions for the most part holding that the findings of administrative officers, where there is discretion, must be considered final and not subject to review, cases upholding the rule being for the most part cases in which there are findings as to the filing of a particular document on a particular day, the entry of an order in a particular matter on a particular day, something concerning the internal workings of the Department, as to which their knowledge is presumably final.

These cases which Your Honor has there, of course, of another circuit, and some of the cases cited here in the Parks Falls Lumber Co. case, as I understand, are cases upholding the general proposition that the assessment by the Commissioner is prima facie correct.

Now, when it comes to a matter of getting the legislative intent and ascertaining the legislative intent, subsequent legislation of a similar sort, I feel, may be resorted to. The 1924 Act provided that the decision of the Board of Tax Appeals should be prima facie correct, by inference restricted the taxpayer as compared with the provisions of the
78 previous law where there was no provision of that sort at all. Nowhere, as your Honor remembers and knows, is there any provision that the decision or ruling shall be final. Nowhere in the act under which this suit was brought. The decision of the Board of Tax Appeals is prima facie correct, under the new act.

The Court: Of course, I can't reach any definite conclusion in this matter, unless the government desires to interpose a motion to dismiss this proceeding upon the record thus far made, including the opening statement, which was made by counsel.

Mr. O'Callaghan: And the stipulation of the parties as embodied in the record now, I suppose.

The Court: Is the stipulation filed and introduced in evidence?

Mr. O'Callaghan: Yes. There is no contention, I suppose, on that proposition. Well, the defendant at this time makes a motion to dismiss the case on the ground that it appears at this time that the case was duly presented to the various bodies appointed by the Commissioner and finally determined

by the Commissioner of Internal Revenue, and that as such officer his findings upon the question of fact in the case is conclusive, in the absence of any allegation or charge of fraud or malice or prejudice of any character whatever, which is not disclosed by the pleadings. I ask leave to present
79 such a motion in writing.

The Court: You don't have to present it in writing. I feel that I am impelled to grant this motion.

Mr. Wyman: I think the plaintiff should make an offer of proof, so that there will be no question about the record.

The Court: I cannot deny the offer. I am perfectly willing you should offer the proof.

Mr. Wyman: The plaintiff offers to prove by the witness, W. M. Hopkins, that at intervals throughout the period of seven or eight years prior to the death of the defendant, that the decedent spoke to the witness on many occasions with reference to his financial state and on such occasions made the statement that everything he had was 50-50 with his wife, Jessie L. Wickwire; that half of everything that he had belonged to her; that he made her executrix in his will; that he desired her to have business experience so that she would be able to manage his estate after he died; that he conferred with her relative to the making of investments and purchases involving anything more than nominal sums of money;

We also offer to prove by the same witness that from the year 1913 to 1919, the witness and the decedent played golf together frequently; that the decedent played as many as thirty-six holes of golf in a day; that he discussed the question of his diabetic condition with the witness at various times up to the year 1919, and that on these occasions he said that he was taking care of himself and followed his diet, and that he was feeling very well; that the witness spoke to the
80 decedent in September, 1918, about filing separate income tax schedules, and that he was then told that, unless there had been an actual physical division, he could not do that; that in 1919 a discussion of the same matter came up, with the same conversation between the witness and decedent; that the decedent and the witness played gold together as late as October, 1919, before decedent went South, and that he appeared to be vigorous and active and, to all external appearances, in good health; and that in December, 1919, after having received corrected glasses for the eye difficulty, when witness asked how he was feeling and he said "fine, the eyes are all right now."

I also offer to prove by the witness Dr. A. J. Hodgson that he treated the decedent for diabetes from the year 1910 or 1911 until the date of his death, seeing him on an average of five or six times a week; that when he came to him in 1910 or 1911, he was sick, and very weak, scarcely able to walk; that he was placed on a limited diet, a diabetic diet, and his health increased; that the decedent frequently talked with the doctor about the question of his health and that, in a joking way, he said, informed the doctor that the doctors had told him years ago that he would only live a few years, and that he was going to outlive them all; that this doctor, Dr. Hodgson, the witness, proposed, told him repeatedly that, if he followed his diabetic diet, he would live beyond the
81 normal span, and that he said, "I intend to."

I offer to prove by the same witness that he followed the diet prescribed carefully, and that during the last three years of his life up to a month or two before his death, there was no sugar in his urine; that he was what the doctors call a diabetic, but that he did not have the disease known as diabetes.

We expect to prove by the same doctor that there was absolutely no connection between any eye trouble which he had in October and his diabetic condition; that the same physician, the proposed witness, saw the decedent as late as February, two and a half months before he died; that he took an automobile ride of 180 miles in one day and played golf regularly; and that in the opinion of this physician he was, except for the diabetic circumstance, in perfect health, and that this impaired his physical condition in no way observable.

We offer to prove by the witness Dr. Cassius D. Wescott that he treated the decedent for the eye trouble in October, 1919, which had caused astygmatism, that he prescribed glasses and corrected his astygmatism, and that this affection was no cause for alarm and was not connected with the diabetes in any way.

We offer to prove by the last witness, the plaintiff, Jessie L. Wickwire, that the decedent told her as far back as
82 1912, at the time he made his will, that one-half of everything he had was hers; that he wanted her to know how to manage it so as to be able to take care of the rest of his estate when he died, she being executrix in his will; that at divers times from that time up to the date of his death, and for many years before his death, she spoke to him about

making purchases involving considerable sums of money for expensive rugs and imported clothing, expenditures for charity and the like, and that on each of such occasions decedent told her that one-half of all he had was hers and that she should not ask him about it, that if she wanted to do it she should make the expenditures.

We offer to prove by this witness that she and the decedent were married in 1899; that he was afflicted with diabetes in 1902, made annual trips to Carlsbad for a period of four or five years, commencing in 1905, and then commenced going to Dr. Hodgson, of Waukesha; that his improvement was marked from that time on; that he never had a sick day, not a day in bed from sickness; that he ate the same food at the dinner table and ate all meals six months before he died as he had ten years before; that she overheard a conversation between himself and the doctor, on the train in the late fall of 1919 in which the decedent said, "Some doctors said I was going to die before I came to you, but I am going to live to be a 100 now."

We expect and offer to show by the same witness that
83 he played golf two or three times a week up to the last year of his life, and played golf down in Florida two or three times a week within two months of the date of his death; that he became afflicted with what the doctors called influenza down there and was brought back home here and died.

We offer to show that a memorandum was made in 1919, in October, in which he stated that one-half of everything he had belonged to his wife, that an actual physical division of the property was made between them, that he turned over to her $302,000.00 worth of bonds in December just before they left for the South; that a conversation took place at that time in the presence of the witness, between the decedent and an assistant in his place of business in which the question of making separate returns for income tax came up, and that the transfer was made immediately after the assistant informed the decedent that a physical division of the property was necessary in order to support separate income tax returns.

Mr. O'Callaghan: Every offer is denied, the record shows.

The Court: Yes. Do you object?

Mr. O'Callaghan: Yes, there's an objection. And also there are further objections to parts of the testimony, those parts of the testimony where it is offered to show the conduct

or acts of the decedent after the transfer of the property; that is objectionable because that testimony wouldn't be competent after the transfer was made.

84 The Court: Well, of course, there are certain portions of this offer that in the mind of the Court are incompetent testimony, but independent of the incompetency of various portions of the testimony or evidence offered, I understand that you are objecting because it appears in this record that the administrative officers have entered into a decision upon this debatable question, that this evidence is being offered on.

Mr. O'Callaghan: Yes.

The Court: I understand there is no controversy; that the administrative officers did have a hearing at which evidence was submitted by both parties upon this particular question.

Mr. O'Callaghan: This same evidence was submitted.

The Court: And that was a debatable question, and the administrative officers found against the petitioner. In view of what appears in the opening statement and what appears in this offer and the stipulation, the court feels impelled to say at this time that, from his point of view, he has no discretion, that this court has no discretion under our system of jurisprudence. The decision of the United States Circuit Court of Appeals for the Seventh Circuit becomes the law of that district until it is reversed or modified or otherwise held amended by the Supreme Court of the United States.

The court feels further that a correct reading of that 85 case can lead to but one conclusion, that that court was of the opinion that the determination of facts by the heads of departments in the administration of governmental affairs are conclusive, in the absence of any controlling provision of law.

The court did proceed to discuss the offer of testimony which was made. If the court meant what it said, it was wholly unnecessary for the Court to proceed with a discussion of the offer. What may have impelled the court to further discuss or further consideration of the facts, we have no light upon. But, independent of that consideration, it appears that the court was of the opinion that where administrative officers pass upon facts submitted to them for decision, and the question submitted is a debatable question of fact, and a fair hearing has been had, in the absence of any showing of any illegality or unconstitutionality or fraud, it is the duty of the

judicial department to refrain from a reconsideration of those particular questions of fact thus considered and thus decided.

That conclusion the court comes to independent of any feeling upon his part that it is a correct policy of government. I am not sure that I would want to approve such a doctrine in its entirety. But I don't feel that I have any discretion in the premises.

In that situation the motion to dismiss will be allowed and the petition dismissed and the jury will be discharged.

Mr. O'Callaghan: With reference to the stipulation there, of course, the thought comes to me that that is an offer of testimony by you, is it?

86 Mr. Wyman: No. That's a stipulation by counsel.

The Court: I understand both parties have stipulated certain facts are correct and that shall be part of the record.

Mr. Wyman: Yes.

The Court: I have considered this record as though this stipulation were included before me. Do I understand that is right? Is that correct?

Mr. O'Callaghan: Yes, that is correct.

Mr. Wyman: That is correct.

Said stipulation being in words and figures as follows:

(Venue and Court as herein)

Jessie L. Wickwire, Individually and as Executrix and Trustee Under the Last Will and Testament of Edward L. Wickwire, deceased,
vs.
Mabel G. Reinecke, as Collector and as Acting Collector of Internal Revenue, First District of Illinois.
} No. 34608

STIPULATION.

Subject to the right of the parties hereto to introduce such further competent evidence as either may desire, it is hereby stipulated by and between the parties hereto by their respective attorneys that for the purpose of facilitating the

87 trial of the above entitled case the following facts are admitted, and may be admitted upon the trial of this case and without further proof thereof, namely:

(1) That on the 22nd day of December, 1919, Edward L.

Wickwire gave and transferred to his wife, the plaintiff herein, the actual and physical possession of divers moneys and securities of the value of to-wit, $362,028.48.

(2) That said Edward L. Wickwire died on to-wit: the 21st day of April, 1920, of a disease diagnosed as uremic poisoning.

(3) That said Edward L. Wickwire, deceased, left a last will and testament in which he nominated his wife, plaintiff herein, as executrix and trustee; that said will was filed and admitted to probate.

(4) That in accordance with the law plaintiff thereafter filed a certain report for the purpose of ascertaining the federal estate tax, due from the estate of said deceased, showing a net estate, subject to federal estate tax, of $242,200.11 (which sum included no portion of said amount of $362,028.48); that thereafter the plaintiff paid John C. Cannon, Collector of Internal Revenue, First District, Illinois, as and for a federal estate tax owing by the estate of said deceased the sum to-wit: $5,266.00.

(5) That plaintiff was duly discharged by the Probate Court of Cook County as executrix and entered upon her duties and is now acting as Trustee under the last will and testament of said deceased.

88 (6) That after the payment of said tax above mentioned, plaintiff was notified by the Collector of Internal Revenue of Chicago, Illinois, that a certain transfer of cash and securities valued at the sum of to-wit: $362,028.48 made by said Edward L. Wickwire in his lifetime to Jessie L. Wickwire, plaintiff herein was deemed by said Collector to have been made in contemplation of death and as such to be taxable under and by virtue of Section 402 of the Revenue Act of 1918; that thereafter a hearing was had on said claim for additional tax before the Internal Revenue Agent in Charge, in the Federal Building, Chicago, Illinois, who thereafter transmitted his report of the evidence adduced and his conclusions thereon to the Commissioner of Internal Revenue, Washington, D. C.; that thereafter plaintiff was notified by one McKenzie Moss, Deputy Commissioner, that the Government had reached the conclusion that said transfer was made in contemplation of death and that the value of the property so transferred was consequently subject to federal estate tax; that thereafter plaintiff received a letter from the Collector of Internal Revenue for the First District of Illinois, enclosing a communication from the Commissioner of Internal

Revenue, Washington, D. C., advising an additional tax liability against the estate of said Edward L. Wickwire, deceased, amounting to $18,411.23, which amount unless paid within thirty (30) days from date of receipt of said communication would bear interest at the rate of 10% per
89 annum, that thereafter the Treasury Department at Washington, D. C., notified counsel for plaintiff that another hearing would be granted for the purpose of argument of the question of the taxability of said transfer, provided that plaintiff would file a claim for abatement within thirty (30) days from receipt by the estate of Bureau letter of notification dated March 3, 1923, which said claim for abatement was thereafter and within said period of thirty (30) days duly and properly filed; that said hearing was had at Washington, D. C., before the Board of Appeals and that thereafter plaintiff was advised by the Acting Deputy Commissioner at Washington, D. C., that the Committee on Review and Appeals considered said transfer taxable.

(7) That on to-wit: the 21st day of April, 1923, the defendant, Mabel G. Reinecke, was duly appointed Acting Collector of Internal Revenue, and is now in fact the duly appointed and acting Collector of Internal Revenue.

(8) That of said sum of $18,411.23 above mentioned, the sum of $18,021.41 constituted the amount of federal estate tax at the rate prescribed by law upon the said total sum of $362,028.48 over and above the amount of tax theretofore paid by plaintiff.

(9) That said Mabel G. Reinecke, as Collector of Internal Revenue for the First District of Illinois, demanded and requested plaintiff to pay to her on to-wit: the 21st day of
90 April, 1923, said sum of $18,411.23 (including said sum of $18,021.41) as the balance of said tax due from the estate of said Edward L. Wickwire, deceased; that on the 20th day of April, 1923, the plaintiff paid to the defendant the sum of $18,021.41 and the further sum of $389.82, such principal sum being the additional tax assessed against the estate of said decedent as set forth in Paragraph 6 hereof; that at said time and place plaintiff served written notice upon the defendant that said payment was made under protest and solely for the purpose of avoiding the imposition of the penalties provided by law and that plaintiff reserved all her rights to recover said amount, which was erroneously and illegally assessed and collected; that thereafter plaintiff filed with the Commissioner of Internal Revenue at Washington,

D. C., her claim for the refund of additional tax paid by her as above set forth to the extent of said sum of $18,021.41 and on to-wit, the 30th day of July, 1923, plaintiff was duly notified by letter from the said Commissioner of Internal Revenue that the claim for abatement and refund theretofore filed by plaintiff for abatement and refund of said additional tax were each rejected and denied; that thereafter this suit was instituted.

W. M. Hopkins
Austin L. Wyman
Attorneys for Plaintiff.
Edwin A. Olson
Attorney for Defendant.

91 Mr. Wyman: Pray an appeal. We will go up.

The Court: (addressing the jury) You, gentlemen, may be excused until ten o'clock tomorrow morning. I will preserve exceptions for you and allow you 60 days for a bill of exceptions.

Mr. Wyman: That would be sufficient.

The Court: In case you see fit to apply for a writ of error, to file a petition for a writ of error, accompanied by an asignment of errors, if I am here I will allow that writ; otherwise it will be submitted to some of the other judges. In such case the supersedeas bond will be fixed at $500.00. Will that give you the entire record?

Mr. Wyman: Yes.

The above and foregoing being all of the evidence offered or received on the trial of said cause.

And thereupon the defendant again renewed her motion to dismiss said cause and to enter judgment in her favor for the costs of said action; and after the argument of counsel, both of the plaintiff and the defendant, upon said motion, the said motion was by the court sustained, to which action of the Court in sustaining the same the plaintiff by her counsel then and there duly excepted.

92 And thereupon the Court found the issues in favor of the defendant and against the plaintiff and thereupon entered judgment against the plaintiff and in favor of defendant for the costs of said cause, to which action of the Court in entering such judgment the plaintiff by her counsel then and there duly excepted.

And thereupon the Court granted leave to plaintiff to apply for a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit, to review the finding and

judgment as aforesaid, then and there allowing plaintiff sixty days within which to file a Bill of Exceptions and fixing her appeal bond in the amount of $500.

And forasmuch, therefore, as the above and foregoing matters and things do not fully appear of record, the plaintiff presents this her Bill of Exceptions, by her reserved herein, and prays that the same may be allowed, signed and sealed by the Judge of this Court and filed and made a part of the record in this case, pursuant to the statute, which is accordingly done this 17th day of August, A. D., 1925.

WALTER C. LINDLEY
District Judge.

O K:

JAMES A. O'CALLAHAN,
Special Attorney.

The above and foregoing Bill of Exceptions is hereby approved:

AUSTIN L. WYMAN
Attorney for Plaintiff
EDWIN A. OLSON
Attorney for Defendant.
per LEO KLEIN
Asst. U. S. Atty.

32 And afterwards on, to wit, the 15th day of August, 1925 this matter coming on to be heard, the following order was entered by the Court:

33 • • • • • •

Saturday, August 15, 1925.

Present: Hon. James H. Wilkerson, Judge of Said Court:

This day comes the plaintiff by her attorneys and presents herein the plaintiff's Bill of Exceptions, which Bill of Exceptions is marked—presented by the Court and taken under advisement.

It Is Further Ordered that the time within which to file said Bill of Exceptions be and the same is hereby extended sixty (60) days.

It Is Further Ordered that leave be and the same is hereby given the plaintiff to file Writ of Error.

34 And on to-wit: the 15th day of October, A. D. 1925, there was filed in the Clerk's office of said court a certain Stipulation, in words and figures following to-wit: Filed 1925

35 • • • • • •

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective attorneys, that the time in which to allow, sign, settle and file a Bill of Exceptions herein be extended to and including December 16, 1925.

Dated this 14th day of October, 1925.

AUSTIN L. WYMAN, FOREST D. SIEFKIN AND ARTHUR R. FOSS
Attorneys for Plaintiff
EDWIN A. OLSON,
U. S. Attorney,
EDWIN A. OLSON,
Attorney for Defendant

(Endorsed) Filed October 15, 1925 Charles M. Bates

36 And afterwards on, to wit, the 15th day of October, 1925 this matter coming on to be heard, the following order was entered by the Court: Ent 15

37 • • • • • •

Thursday, October 15, 1925.

Present: Hon. George A. Carpenter, Judge of Said Court:

On stipulation of the parties to this suit filed herein It Is Ordered that the time in which to sign, settle and file plaintiff's Bill of Exceptions be and the same is hereby extended to December 16, A. D. 1925.

38 And afterwards on, to wit, the 16th day of December, 1925 this matter coming on to be heard, the following order was entered by the Court:

39 • • • • • •

Wednesday, December 16, 1925.

Present: Hon. George A. Carpenter, Judge of Said Court:

On stipulation of the parties to this suit filed herein, It Is Ordered that the time within which to allow, sign, settle and file a Bill of Exceptions herein be and the same is hereby extended to and including December 28th, A. D. 1925.

15. 18 And on to-wit: the 15th day of August, A. D. 1925 there was filed in the Clerk's office of said court a certain Petition for Writ of Error, in words and figures following to wit:

19 • • • • • •

PETITION FOR WRIT OF ERROR.

And Now comes Jessie L. Wickwire, plaintiff herein, by Austin L. Wyman, Forest D. Siefkin, and Arthur R. Foss, her attorneys, and says that on or about the 18th day of June, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the seventh circuit, for the correction of
20 errors so complained of, and that a transcript of the record, proceedings, and papers in this cause duly authenticated may be sent to said Circuit Court of Appeals.

JESSIE L. WICKWIRE
by AUSTIN L. WYMAN
FOREST D. SIEFKIN
ARTHUR R. FOSS
Attorneys for Plaintiff

WYMAN, HOPKINS, McREEVE & COLBERT
REX, MILLER & BAAR,
Of Counsel

(Endorsed) Filed Aug. 15, 1925 Charles M. Bates Clerk.

22 And on to-wit: the 15th day of August, A. D. 1925, there was filed in the Clerk's office of said court a certain Assignment of Errors, in words and figures following to-wit: Filed 192

23 * * * * * *

ASSIGNMENT OF ERRORS.

Now comes the plaintiff, Jessie L. Wickwire by Austin L. Wyman, Forest D. Siefkin, and Arthur R. Foss, her attorneys, in connection with her petition for writ of error, says that in the record, proceedings, and judgment in said cause, manifest error has intervened to the prejudice of the plaintiff, to-wit:

First. The court erred in excluding evidence offered by the plaintiff substantially, as follows:

That on the 22nd day of December, 1919, Edward L. Wickwire gave and transferred to his wife, the plaintiff herein, the actual and physical possession of divers moneys and securities of the value of to-wit: $362,028.48.

24 That said Edward L. Wickwire died on to-wit: the 21st day of April, 1920, of a disease diagnosed as uremic poisoning; that he then was 62 years of age.

That said Edward L. Wickwire, deceased, left a last will and testament in which he nominated his wife, plaintiff herein, as executrix and trustee; that said will was filed and admitted to probate.

That in accordance with the law plaintiff thereafter filed a certain report for the purpose of ascertaining the federal estate tax, due from the estate of the deceased, showing a net estate, subject to federal estate tax, of $242,200.11 (which sum included no portion of said amount of $362,028.48); that thereafter the plaintiff paid John C. Cannon, Collector of Internal Revenue, First District, Illinois, as and for a federal estate tax owing by the estate of said deceased the sum to-wit: $5,266.00.

That plaintiff was duly discharged by the Probate Court of Cook County as executrix and entered upon her duties and is now acting as Trustee under the last will and testament of said deceased.

That after the payment of said tax above mentioned, plaintiff was notified by the Collector of Internal Revenue of Chi-

cago, Illinois, that a certain transfer of cash and securities valued at the sum of to wit: $362,028.48 made by said Edward L. Wickwire in his lifetime to Jessie L. Wickwire, plaintiff herein, was deemed by said Collector to have been made in contemplation of death and as such to be taxable under and by virtue of Section 402 of the Revenue Act of 1918; that thereafter a hearing was had on said claim for additional tax before the Internal Revenue Agent in Charge, in the Federal Building, Chicago, Illinois, who thereafter transmitted his report of the evidence adduced and his conclusions thereon to the Commissioner of Internal Revenue, Washington, D. C.; that thereafter plaintiff was notified by one McKenzie Moss, Deputy Commissioner, that the Government had reached the conclusion that said transfer was made in contemplation of death and that the value of the property so transferred was consequently subject to federal estate tax; that thereafter plaintiff received a letter from the Collector of Internal Revenue for the First District of Illinois, enclosing a communication from the Commissioner of Internal Revenue, Washington, D. C., advising an additional tax liability against the estate of said Edward L. Wickwire, deceased, amounting to $18,411.23, which amount unless paid within thirty (30) days from date of receipt of said communication would bear interest at the rate of 10% per annum; that thereafter the Treasury Department at Washington, D. C., notified counsel for plaintiff that another hearing would be granted for the purpose of argument of the question of the taxability of said transfer, provided that plaintiff would file a claim for abatement within thirty (30) days from receipt by the estate of Bureau letter of notification dated March 3, 1923, which said claim for abatement was thereafter and within said period of thirty (30) days duly and properly filed; that said hearing was had at Washington, D. C. before the Board of Appeals and that thereafter plaintiff was advised by the Acting Deputy Commissioner at Washington, D. C. that the Committee of Review and Appeals considered said transfer taxable.

That on to wit: the 21st day of April, 1923, the defendant, Mabel G. Reinecke, was duly appointed Acting Collector of Internal Revenue, and is now in fact the duly appointed and acting Collector of Internal Revenue.

That of said sum of $18,411.23 above mentioned, the sum of $18,021.41 constituted the amount of federal tax at the rate

prescribed by law upon the said total sum of $362,028.48 over and above the amount of tax theretofore paid by plaintiff.

That said Mabel T. Reinecke, as Collector of Internal Revenue for the First District of Illinois, demanded and requested plaintiff to pay to her on to-wit: the 21st day of April, 1923, said sum of $18,411.23 (including said sum of $18,021.41) as the balance of said tax due from the estate of said Edward L. Wickwire, deceased; that on the 20th day of April, 1923, the plaintiff paid to the defendant the sum of $18,021.41 and the further sum of $389.82, such principal sum being the additional tax assessed against the estate of said decedent as set forth in Paragraph 6 hereof; that at said time and place plaintiff served written notice upon the defendant that said payment was made under protest and solely for the purpose of avoiding the imposition of the penalties provided by law and that plaintiff reserved all her rights to recover said amount, which was erroneously and illegally assessed and collected; that thereafter plaintiff filed with the Commissioner of Internal Revenue at Washington, D. C. her claim for the refund of additional tax paid by her as above set forth to the extent of said sum of $18,021.41 and on to-wit: the 30th day of July, 1923, plaintiff was duly notified by letter from the said Commissioner of Internal Revenue that the claim for abatement and refund theretofore filed by plaintiff for abatement and refund of said additional tax
27 were each rejected and denied; that thereafter this suit was instituted.

That the decedent, Edward L. Wickwire, in 1899, was married to the plaintiff, Jessie L. Wickwire. About 1912, the decedent told plaintiff that half of everything he owned belonged to her and that he desired that she should know how to manage such property so that she would be able to take care of his estate when he died, she being appointed executrix in his will; that many times thereafter up to the date of his death and for many years before his death, she spoke to him about making purchases of rugs and imported clothing, and expenditures for charity, which involved considerable sums of money and that on each such occasion the decedent told her that half of all the property he had belonged to her and that she could make any such expenditures as she desired without asking him about it.

That in September, 1918, the decedent consulted with W. M. Hopkins about filing separate income tax returns for himself and wife and that he learned that unless there had

been an actual and physical division of the property, such separate income tax returns could not properly be filed and that in 1919 a discussion of the same matter was had between this witness and the decedent.

That on October 10, 1919, the decedent made a memorandum in which he stated that one-half of everything he possessed belonged to his wife; that on December 22nd of that year an actual physical division of said property was made between them, at which time he delivered to her cash and securities valued at the sum of to-wit: $362,028.48, as being her absolute, exclusive, and individual property; that this transfer occurred just prior to the time they left for a sojourn in Florida.

28 That until about the year 1917 the property possessed by the decedent consisted almost entirely of an interest in a corporate business; that the stock of this corporation was exclusively held and was not readily salable. About 1917 the business was reorganized and the stockholders received substantial dividends in bonds that had been purchased and held by the company; that this liquidation whereby the decedent acquired that dividend of bonds was the reason, or one of the reasons, for the actual division in 1919 rather than many years before of the property possessed by the decedent.

That in 1902 the decedent was afflicted with diabetes, and for a period of four or five years, commencing in 1905, he made annual trips to Calsbad, seeking relief for his trouble; that in 1910 the decedent became a patient of Dr. A. J. Hodgson, of Waukesha, Wisconsin; that his condition at that time was serious; he was very weak and scarcely able to walk; that he was placed upon a limited diabetic diet, and his health immediately improved until, in a year or so, the decedent expressed satisfaction with his physical health and often stated he would live beyond the normal span, possibly to be one hundred years old.

That the decedent followed the diet prescribed for him very carefully and during the last three years of his life, up to a month or two before his death, there was no sugar in his urine; that during that time he did not have the disease known as "diabetes"; he was merely what the medical profession calls a "diabetic."

29 That from the time that the decedent was treated by Dr. Hodgson, decedent was in good spirits, he was vigorous and active, and to all external appearances, in good

health; that he played golf often and enthusiastically during the period from 1913 to 1920, often playing as many as thirty-six holes in a day; that in February, 1920, he took an automobile ride of 180 miles in one day; that the opinion of his physician was that as late as February, 1920, the decedent, except for the diabetic condition, was in perfect health and that the diabetic condition impaired his physical being in no way that was observable.

That in October, 1919, the decedent had some trouble with his eyes which in no way was connected with his diabetic condition; that he consulted Dr. Cassius D. Westcott regarding his eye trouble and Dr. Westcott prescribed glasses which were corrected for the astigmatism that was present; that shortly after securing such glasses, the decedent was asked how he was feeling, and he replied, "Fine; the eyes are all right now."

Second. The court erred in refusing to submit to the jury the issues raised by the pleadings.

Third. The court erred in refusing to permit the plaintiff to show that a transfer of certain assets by Edward L. Wickwire to the plaintiff on or about December 22, 1919, was not in contemplation of death within the meaning of the Revenue Act of 1918.

Fourth. The court erred in refusing to permit the jury to pass upon the question whether a transfer of certain assets by Edward L. Wickwire to the plaintiff on or about December 22, 1919, was or was not in contemplation of death.

Fifth. The court erred in holding and deciding, after defendant pleaded the general issue and in the absence of any special plea of res adjudicata, that there had been a binding adjudication of the matters and things set forth in the declaration herein.

Sixth. The court erred in holding and deciding that the finding and decision of the Commissioner of Internal Revenue in a hearing before him upon the same issues of fact as are here involved are final, conclusive, and binding upon the plaintiff.

Seventh. The court erred in granting the motion of the defendant to dismiss said cause.

Eighth. The court erred in rendering judgment against this plaintiff upon granting the defendant's motion to dismiss.

Wherefore, plaintiff prays that said errors be corrected,

the judgment of the District Court be reversed and the cause remanded for trial upon the merits thereof.

JESSIE L. WICKWIRE.
By AUSTIN L. WYMAN,
FOREST D. SIEFKIN,
ARTHUR R. ROSS,
Attorneys for Plaintiff.

WYMAN, HOPKINS, McKEEVER & COLBERT, and
KIXMILLER & BAAR,
of Counsel.

(Endorsed) Filed Aug. 15, 1925 Charles M. Bates, Clerk.

97 And on to-wit: the 17th day of December, A. D. 1925, come Jessie L. Wickwire, individually, and as executrix of and Trustee under the last will and testament of Edward L. Wickwire, deceased, as principal, and Maryland Casualty Company, as surety, and filed in the Clerk's office of said Court in said entitled cause, a certain Bond on Writ of Error, in words and figures following to-wit:

98 Know All Men by these Presents, That we, Jessie L. Wickwire, individually, and as executrix of and Trustee under the last will and testament of Edward L. Wickwire, deceased, as principal, and Maryland Casualty Company, as sureties, are held and firmly bound unto Mable T. Reinecke, as collector, and as acting collector of Internal Revenue, for the first district of Illinois in the full and just sum of Five Hundred dollars ($500.00) to be paid to the said Mabel T. Reinecke, as collector, and as acting collector of Internal Revenue, for the first district of Illinois certain attorney, executors, administrators, or asigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, _____ in a suit pending in said Court, between Jessie L. Wickwire, etc. plaintiff , and Mabel T. Reinecke, etc. defendant a judgment was rendered against the said Jessie L. Wickwire,

etc. and the said Jessie L. Wickwire, etc. having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mabel T. Reinecke, etc. citing and admonishing her to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said Jessie L. Wickwire, etc. shall prosecute her writ to effect, and shall answer all damages and costs that may be awarded against her if she fails to make her plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JESSIE L. WICKWIRE (Seal)
MARYLAND CASUALTY COMPANY (Seal)
R. E. HALL (Seal)
R. E. HALL, *Attorney-in-fact.*

Sealed and delivered in presence of—
W. M. HOPKINS
MARGARET R. GROEFF
HAROLD ENGSTROM
Approved by—
WALTER C. LINDLEY,
(Seal) *Judge.*

(Endorsed) Filed Dec. 17, 1925 Charles M. Bates, Clerk.

94 And afterwards on, to wit, the 17th day of December, 1925, this matter coming on to be heard, the following order was entered by the Court: Entered Dec. 17, 1

95 * * * * * *

ORDER.

This cause coming on to be heard on the motion of Jessie L. Wickwire, individually and as executrix and trustee under the last will and testament of Edward L. Wickwire, deceased, the plaintiff herein, by Austin L. Wyman, Forest D. Siefkin and Arthur R. Foss, her attorneys, for the entry of an order approving the Bill of Exceptions in the above entitled cause and also on plaintiff's petition for an order allowing said

plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit to review the judgment heretofore entered in this court on the 18th day of June, 1925.

96 And the said plaintiff having duly filed with the clerk of this court her Assignment or Errors and having presented to this court her bond on such writ of error in the penal sum of five hundred dollars (500), executed by herself as principal and the Maryland Casualty Company as surety, and due notice of this motion and petition having been given to the defendant, and the court being now fully advised in the premises,

1. It Is Ordered that the Bill of Exceptions this day presented is hereby approved and the clerk of the court is directed to file the same and make it a part of the record in said cause.

2. It Is Further Ordered that a writ of error be allowed to said plaintiff to review said judgment entered by this court herein on June 18, 1925; that said writ of error be issued returnable as required by law, and that a citation be issued to the defendant in error.

3. It Is Further Ordered that the bond presented by said plaintiff, executed by herself as principal and by the Maryland Casualty Company as surety and conditioned as required by law, be and it is hereby approved.

4. And It Is Further Ordered that pending the proceedings on said writ of error, all proceedings in this court be stayed.

Enter:

WALTER C. LINDLEY,
Judge of the District Court.

101 UNITED STATES OF AMERICA, SS:

The President of the United States To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Jessie L. Wickwire, Individually and as Executrix and Trustee Under the Last Will and Testament of Edward L. Wickwire, deceased, Plaintiff, and Mabel G. Reinecke, as Collector and as Acting

Collector of Internal Revenue, First District of Illinois, in Law Case No. 34608 a manifest error hath happened, to the great damage of the said Jessie L. Wickwire, Individually and as Executrix and Trustee Under the Last Will and Testament of Edward L. Wickwire, deceased, Plaintiff, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Wm. Howard Taft, Chief Justice of the United States, the 17th day of December in the year of our Lord one thousand nine hundred and twenty-five.

CHARLES M. BATES
Clerk of the District Court of the United States for the Northern District of Illinois.

Allowed by
WALTER C. LINDLEY,
Judge.

Northern District of Illinois, } ss:

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 14 day of January, A. D. 1926.

CHARLES M. BATES
Clerk United States District Court Northern District of Illinois.

(Seal)

* * * * * *

(Endorsed) Writ of Error. Filed Dec 17 1925 at o'clock M. Charles M. Bates Clerk. Copy deposited for the defendant in error in the Clerk's Office, U. S. District Court, Northern District of Illinois.

Dec. 31. 99 And on to wit: the 31st day of December, A. D. 1925, there was filed in the Clerk's office of said court a certain Stipulation, in words and figures following to wit:

100 * * * * * *

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the original Bill of Exceptions filed in the above entitled cause, may be transmitted, as a part of the record herein, by the Clerk of the District Court to the Circuit Court of Appeals for the Seventh Circuit, to be used by the Clerk of the Circuit Court of Appeals in making up the record in said court.

AUSTIN L. WYMAN
FOREST D. SIEFKIN
ARTHUR R. FOSS
Attorneys for Plaintiff.
EDWIN A. OLSON,
U. S. District Attorney,
Attorney for Defendant.

December 30, 1925.

(Endorsed) Filed Dec. 31, 1925. Charles M. Bates, Clerk.

102 • • • • • •

PRAECIPE FOR RECORD.

Filed [illegible] 1925.

To the Clerk of Said Court:

Please prepare a transcript of the record in accordance with the rules of the United States Circuit Court of Appeals for the Seventh Circuit, to be filed in said court under the Writ of Error allowed to review the judgment of this court entered on June 18, 1925, to include the following:

Summons and Return,
Declaration,
Plea,
Replication to Plea,
Order allowing motion to dismiss action,
Judgment entered June 18, 1925.
Order entered August 15, 1925, extending time for approving Bill of Exceptions to October 17, 1925,

103 Petition for Writ of Error filed August 15, 1925,
Assignment of Errors filed August 15, 1925,
Order entered August 15, 1925, allowing Writ of Error,
Order entered October 15, 1925, extending time for approving Bill of Exceptions to and including December 16, 1925,
Order entered December 16, 1925, extending time to December 28, 1925, in which to approve Bill of Exceptions,
Bill of Exceptions,
Writ of Error,
Bond on Writ of Error,
Citation,
Praecipe,
Stipulation dated December 30, 1925.

AUSTIN L. WYMAN
FOREST D. SIEFKIN
ARTHUR R. FOSS.
Attorneys for Plaintiff.

(Endorsed) Filed Dec. 30, 1925. Charles M. Bates, Clerk.

104 Northern District of Illinois
Eastern Division } ss:

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled Jessie L. Wickwire, Individually and as Executrix and Trustee Under the Last Will and Testament of Edward L. Wickwire, deceased, vs. Mabel F. Reinecke, as Collector and as Acting Collector of Internal Revenue, First District of Illinois, at Law No. 34608, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 14th day of January, A. D. 1926.

CHARLES M. BATES
(Seal) *Clerk.*

105 UNITED STATES OF AMERICA, SS.

The President of the United States, To Mabel G. Reinecke, as Collector and as Acting Collector of Internal Revenue, First District of Illinois, Federal Building, Chicago, Illinois, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to Writ of Error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Jessie L. Wickwire, Individually and as Executrix and Trustee Under the Last Will and Testament of Edward L. Wickwire, deceased, is plaintiff in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter C. Lindley Judge of the District Court of the United States, this 17th day of Decem-

ber, in the year of our Lord one thousand nine hundred and twenty-five.

WALTER C. LINDLEY
U. S. District Judge

On this ..... day of ....., in the year of our Lord one thousand nine hundred and ....., personally appeared ..... before me, the subscriber, ...

and makes oath that he delivered a true copy of the within citation to .....

Sworn to and subscribed the ..... day of ..... A. D. 19

Service of the within citation on Mabel G. Reinecke, as Collector and as Acting Collector of Internal Revenue, First District of Illinois, the defendant in error named therein, is hereby accepted this 18th day of December, 1925.

EDWIN A. OLSON
United States District Attorney,
per LEO KLEIN
Asst. U. S. Atty., Her Attorney.

* * * * * *

(Endorsed) Citation. Returnable January 16 1925 Charles M. Bates Clerk. Filed Dec 18 1925 at o'clock M. Charles M. Bates Clerk

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 55, inclusive, contain a true copy of the Printed Record, printed under my supervision and filed on March 2, 1926, on which the following entitled cause was heard and determined:

Jessie L. Wickwire, Individually and as Executrix and Trustee under the Last Will and Testment of Edward L. Wickwire, Deceased,

vs.

Mabel G. Reinecke, as Collector and as acting Collector of Internal Revenue, First District of Illinois,

No. 3703, October Term, 1925, as the same remain upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Twelfth day of November, A. D. 1926.

EDWARD M. HOLLOWAY (Signed)
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United State Court Room in the city of Chicago in said Seventh Circuit on the sixth day of October, 1925, of the October Term in the year of our Lord one thousand nine hundred and twenty-five and of our Independence the one hundred and fiftieth.

And afterwards, to wit: On the fifteenth day of January, 1926, there was filed in the office of the clerk of this court an appearance of counsel for Plaintiff in Error, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3703 October Term 1925.

Jesse L. Wickwire, as Executrix, etc.
Plaintiff in Error,

vs.

Mabel G. Reinecke, as Collector,
Defendant in Error.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

AUSTIN L. WYMAN
FOREST D. SIEFKIN
ARTHUR R. FOSS
231 S. LaSalle St.

Endorsed: Filed Jan. 15, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the nineteenth day of January, 1926, there was filed in the office of the clerk of this court an appearance of counsel for Defendant in Error, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3703 October Term 1925

Jesse L. Wickwire, Individually and as Administratrix,
Plaintiff in Error,

vs.

Mabel G. Reinecke, as Collector, etc.
Defendant in Error.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

EDWIN A. OLSON

Endorsed: Filed Jan. 19, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the thirteenth day of April, 1926, the following further proceedings were had and entered of record, to wit:

Tuesday, April 13, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.

3703 Jesse L. Wickwire, etc. vs. Mabel G. Reinecke, as Collector, etc. } Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing Friday, April 23, 1926.

And afterwards, to wit: On the twenty-third day of April, 1926, the following further proceedings were had and entered of record, to wit:

Friday, April 23, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.

Hon. Evan A. Evans, Circuit Judge.

Hon. George T. Page, Circuit Judge.

Hon. Albert B. Anderson, Circuit Judge.

Edward M. Holloway, Clerk.

Palmer E. Anderson, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.

Hon. George T. Page, Circuit Judge.

Hon. Albert B. Anderson, Circuit Judge.

3703 Jesse L. Wickwire, etc. v. Mabel G. Reinecke, as Collector, etc. } Error to the District Court of the United States for the Northern District of Illinois; Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Forest D. Siefkin, counsel for plaintiff in error and by Mr. J. A. O'Callaghan, Counsel for defendant in error and the Court having heard the same takes this matter under advisement.